

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

LARRY A. MCEWEN,)
Petitioner,)
v.) No. 4:17-CV-487 DDN
JAMES HURLEY,)
Respondent,)

MEMORANDUM AND ORDER

This matter is before the Court on Larry McEwen's amended petition for writ of habeas corpus. The petition is denied.

On November 7, 2008, a jury in the Circuit Court of Washington County found petitioner guilty of second degree assault, first degree assault, and two counts of armed criminal action. *Missouri v. McEwen*, No. 04CR614501-01 (Washington County). On January 15, 2009, the court sentenced him to an aggregate term of fifteen years' imprisonment. After the conclusion of state postconviction relief proceedings, McEwen sought relief under 28 U.S.C. § 2254 in this Court. *McEwen v. Bowersox*, No. 4:12-CV-2293 DDN. The Court denied the petition on May 16, 2014. The Court of Appeals for the Eighth Circuit denied petitioner's application for a certificate of appealability on December 3, 2014.

Petitioner now seeks a writ of habeas corpus under 28 U.S.C. § 2241. He maintains that the Missouri Supreme Court recently denied his Rule 91 habeas petition without due process because it did not require the state to answer it. The amended petition was filed in this action on February 21, 2017.

Petitioner may not bring a second or successive habeas petition without first obtaining leave from the Court of Appeals. *See* 28 U.S.C. § 2244(b). It does not matter whether petitioner labels his petition as coming under § 2241 rather than § 2254; it is the substance of the petition that controls the Court's characterization of it. *See Gonzalez v. Crosby*, 545 U.S. 524, 531 (2005). In this case, relief is only available under § 2254, and therefore, the petition is successive.

Finally, petitioner has failed to demonstrate that jurists of reason would find it debatable whether the petition is successive. Thus, the Court will not issue a certificate of appealability. 28 U.S.C. § 2253(c).

Accordingly,

IT IS HEREBY ORDERED that the petition for writ of habeas corpus is **DENIED**, and this action is **DISMISSED**.

An Order of Dismissal will be filed separately.

Dated this 22nd day of February, 2017.



DAVID D. NOCE
UNITED STATES MAGISTRATE JUDGE